Supreme Court, U.S.
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85-1618

No.

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

JAMES ROBERT SLATTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA FOURTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state permissibly shift the burden of proof on a element of the offense to the defendant in an entrapment case?

2. Are defendants in the state courts of California denied a fair trial because the standard jury instructions do not accurately embody the law of entrapment in California?

3. May a prosecutor invite a jury, during argument, to employ twelve differing standards of entrapment where the law of the state establishes an objective standard of entrapment?

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No.

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

JAMES ROBERT SLATTON,
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner John Robert Slatton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, entered in this proceeding on October 18, 1985, petition for review denied by the California Supreme Court on January 29, 1986, affirming petitioner's convictions for cocaine sales in violation of California Health and Safety Code 11352.

OPINION BELOW

The citation of the opinion of which review is sought in this Court is 173 Cal.App.3d 487 (1985), a true copy of which appears herein as Appendix A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3) on the ground that his rights under the Fourteenth Amendment to the U.S. Constitution were violated.

The California Court of Appeal entered its order rejecting petitioner's Fourteenth Amendment claim on October 18, 1985.

The California Supreme Court denied review in this case on January 29, 1986. The instant Petition for Writ of Certiorari is filed within 60 days of that order.

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was approached by an old high school friend who said that he needed to purchase cocaine. After several false starts, petitioner succeeded in obtaining a sample of cocaine for the friend. The friend at the time was working as an undercover police operative, in tandem with an undercover police officer. The sample of cocaine was

pronounced acceptable. Petitioner's friend and the undercover officer indicated that they desired to purchase cocaine in larger quantities. Petitioner indicated that he was unable to do so, and negotiations were broken off (RT I, 5-23; RT II, 15-22).

There followed a series of phone calls from the friend to petitioner. The friend indicated that he was in jeopardy due to petitioner's inability to locate a large quantity of cocaine. The friend indicated that he was in a great deal of trouble and was about to be hurt (RT II, 26-30).

Petitioner attempted to obtain the cocaine. The police officer and the operative rented a motel room for the purpose of conducting the transaction. Petitioner showed up at the motel room as arranged and announced that he had been unable to locate any cocaine. The police officer feigned anger at the operative; petitioner made a few phone calls from the room in an attempt to purchase cocaine, but remained unsuccessful in his attempts. The police officer then called the deal off for the night (RT I, 32-29; RT II, 26-33).

After a brief lull in activity, due to the police officer going to Las Vegas, the operative resumed his calls to petitioner. Petitioner again agreed to purchase cocaine for his friend. This time petitioner was successful. The motel room was again rented. Petitioner appeared at the room with another man, John Phillips, who later fled while on bail to avoid trial in the matter. Petitioner handed over a brown paper bag containing 223 grams of cocaine, and was arrested in the motel room (RT I, 47-63; RT II, 33-37).

Petitioner was charged by information with two felony counts of violation of California Health and Safety Code 11352, sale or transportation of cocaine. Petitioner proceeded to jury trial and raised the defense of entrapment

within the meaning of the California Supreme Court case of *People v. Barraza* (1979) 23 Cal.3d 675. Petitioner was convicted on the first count of the information, involving the sale of the sample of cocaine. The jury was unable to reach a verdict on the second count and a mistrial was declared. Petitioner was sentenced to nine months in the county jail for his conviction on count one (CT 121, 134-135, 299-300).

Retrial was had on the second count. Petitioner again raised the defense of entrapment. This time petitioner was convicted and sentenced to three years in state prison (CT 301).

Standard jury instructions regarding the law of entrapment in California were given at the close of each trial. Included among them was an instruction that the burden lay with petitioner to establish the defense of entrapment by a preponderance of the evidence. Petitioner's juries were also instructed that the standard by which a successful entrapment defense is to be measured, is whether a "normally law-abiding person" would have been led astray by the police conduct (CT 267-270). Petitioner's arguments post-trial have been directed primarily at these instructions, the law that they embody, and the prosecutor's comments thereon.

Petitioner secured an appeals bond in the amount of $15,000. Petitioner filed his opening brief on appeal alleging, among other issues, prosecutorial misconduct in arguing the law of entrapment. There followed a series of cases interpreting the instructions on entrapment utilized in the California state courts, along with a split of opinion in the appellate courts as to whether the instructions accurately embodied the law as set out in *People v. Barraza*. Petitioner sought and was granted leave to file a

supplemental brief. In that supplemental brief, petitioner argued that he had been deprived of his right to a fair trial by the giving of the standard instructions on entrapment.

The Court of Appeal answered petitioner's contentions in the negative. On October 18, 1985, the Court of Appeal filed its opinion affirming petitioner's convictions and upholding the jury instructions on the entrapment issue. A true copy of that opinion appears herein as Appendix A. Simply stated, the Court of Appeal held that the instructions were true to the principles enunciated in *Barraza* and that petitioner had not been deprived of his right to a fair trial by prosecutorial misconduct in argument.

Petitioner filed for review in the California Supreme Court. Petitioner noted that there now existed a double split in opinion regarding the propriety of the entrapment instructions. One division of the Court of Appeal in San Francisco had struck down the instructions at issue; two other divisions of the Court of Appeal in San Francisco had upheld them. With the publication of the opinion in petitioner's case, there existed conflicts in the law, both intradistrict and interdistrict.

Despite petitioner's assertion that his case presented an ideal vehicle to secure uniformity of decision in this area, his petition for review was denied by the California Supreme Court. This denial occurred on January 29, 1986, by way of what is commonly referred to as a "postcard denial," a copy of which is attached herein as Exhibit B.

REASONS FOR GRANTING THE WRIT

1. California law impermissibly shifts the burden of proof on an element of the offense to a defendant in an entrapment case.

In *In re Winship* this Court held that the Due Process Clause protected the accused against conviction except beyond a reasonable doubt of every fact necessary to constitute the crime. 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). In petitioner's case, the state had the burden to prove all the elements of the crimes, including intent.

California has specifically rejected the subjective federal entrapment standard which focuses on the defendant's predisposition to commit the charged crime *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Instead, the California Supreme Court has chosen the so-called objective test to assure the "lawfulness of law enforcement activity" (*People v. Barraza* (1979) 23 Cal.3d 675). The test under *Barraza* becomes whether the police conduct would generate a motive for the crime, other than ordinary criminal intent, in a normally law-abiding person (*Id.*, at p. 690). This objective standard of entrapment, utilizing a hypothetical "normally law-abiding person" has been likened to the hypothetical "reasonable man" in negligence cases (*People v. Grant* (1985) 165 Cal.App.3d 496, 500).

Despite the adoption of the objective standard in California, which in theory focuses only upon police conduct, the issue of intent remains vitally important when an entrapment defense is raised. This importance is demonstrated by the opinion below in petitioner's case,

which approves the notion that the test of entrapment is not a purely objective one, but a test which "encompasses subjective considerations" (Page 10 of Appendix A). These subjective considerations are echoed in the jury instructions which are given in every entrapment defense case in California. These instructions are concerned to a great extent with the individual character of the accused, as opposed to the police conduct involved in the matter. (Petitioner will next argue that the instructions do not accurately embody the objective test set forth in *People v. Barraza*). California Jury Instruction 4.61, for example, provides that the conduct of the police is not to be viewed in a vacuum, and that subjective characteristics regarding the defendant may be considered by the jury in arriving at a decision (Pages 6 and 7 of Appendix A).

If it were to be assumed that the challenged instructions do embody the law of entrapment, and that the standard of entrapment is a purely objective one, intent still has not been banished from the scene. The relevant intent becomes not that of the individual defendant before the court, but that of the hypothetical "normally law-abiding person" set forth in the case law.

In summary, from whichever direction the question is approached, the issue of intent remains a relevant issue whenever an entrapment defense is raised in a California courtroom. The question then becomes whether the state may properly allocate the burden of proof to a defendant in an entrapment case.

Five years after its holding in *Winship*, this Court ruled that when malice aforethought is an element of the crime charged, the Due Process Clause requires the prosecution—not the defendant—to prove beyond a reasonable doubt the absence of heat of passion, since heat

of passion negates malice aforethought (*Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)). In *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281, however, this Court appeared to limit *Mullaney* when it rejected a constitutional attack on a state statute that required the defendant to shoulder the burden of proving the affirmative defense of extreme emotional disturbance. Similarly, this Court has confirmed that a state may validly require a criminal defendant to prove insanity (*Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). Justice Brennan, however, has pointed out that the insanity defense is not unrelated to the mental element of a crime: "Insanity and mens rea stand in a close relationship, which this Court has never fully plumbed" (*Jones v. U.S.*, —U.S.—, 103 S.Ct. 3043, 3054 n.4 (1983) (Brennan, J. dissenting).

A prominent commentator has distilled the Mullaney-Patterson analysis as follows: "only a true affirmative defense . . . may operate to allocate the burden of persuasion to the accused. Such a defense would consist of facts which exonerate the defendant or reduce the degree of the offense and do not simply disprove an element of the crime." (McCormick on Evidence, 3rd Edition, § 347, page 990 (1982)). McCormick later poses the key question: "The question remains as to when something is an element of the offense" (*Id.*, at § 348, page 997).

As noted above, the entrapment defense in California relates to intent, whether that of the actor or the hypothetical law- abiding person. Since intent is an element of the crime, the state may not permissibly shift the burden of persuasion on the issue, based upon the principles enunciated in *Winship, Patterson* and *Mullaney.* The federal courts in petitioner's district have previously

acknowledged as much: "The issue having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense." (*Notaro v. United States*, 363 F.2d 169, 174-175 (9th Cir.-1966)). As one commentator has noted, "any lesser burden would probably contravene the Constitution." (Guidelines for Entrapment, 13 Criminal Law Bulletin 5, 27 n.99 (1977)).

The issue is an important one with implications far beyond petitioner's case. Cases such as the DeLorean prosecution and ABSCAM have heightened the public's awareness of the dubiousness of police conduct on occasion. The present case reveals a high school friend "leaning" on the petitioner in an attempt to obtain drugs. Yet the police are faced with an unparalled flood of drugs into this country and feel constrained to utilize any methods of counterattack at their disposal. The result, especially in states such as California, with a large population, close to points of entry for contraband, is an upswing in narcotics prosecutions and a concomitant increase in entrapment defenses. The Court's acceptance of the instant petition will settle whether the states may properly delegate the burden of proof in an entrapment case, consistent with *Winship*, *Mullaney* and *Patterson*.

It cannot be argued that the area of law involved is an unimportant one. Professor McCormick has referred to the Court's opinions in this area as creating a "revolution in thought" (*Id.*, at § 347, page 989).

2. The standard jury instructions used in California do not accurately embody the law of entrapment in California.

Petitioner acknowledges that before this Court will overturn a state conviction based upon claim of error in the jury instructions, this Court must find that the claimed error violated some right guaranteed to the defendant by the Fourteenth Amendment (*Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). The jury instructions given at the close of petitioner's trials were so fundamentally unfair as to deny him due process of law. These are the standard jury instructions given in the California state courts at the close of each trial in which entrapment is raised, save in courts responsive to one division of the Court of Appeal in San Francisco, which has ruled that the instructions do not accurately embody the law of entrapment. The issue has thus created a conflict in the intermediate California state courts.

The previously-cited decision of the California Supreme Court in *People v. Barraza* was intended to resolve the controversy regarding entrapment in California. At the close of his trials, petitioner's juries were instructed pursuant to California Jury Instructions 4.60, 4.61 and 4.61.5, which purport to embody the principles enunciated in *Barraza* (Pages 6-7 of Exhibit A).

On appeal, petitioner contended that the instructions were inconsistent with the objective test of entrapment set forth in *Barraza*. Petitioner urged the Appellate Court to follow the holding in *People v. Martinez* (1984) 157 Cal.App.3d 60. Appellant in Martinez had likewise contended that the challenged instructions did not fairly embody the law as set out in *Barraza* (*Id.*, at p. 664).

Appellant in *Martinez* contended that the substance of the Barraza test was "whether a person other than one ready to commit the crime" would have been induced by the police conduct to violate the law (*Id.*, at p. 686)). Petitioner adopted the *Martinez* argument in his own brief, arguing that the challenged instructions erroneously shifted the focus of the entrapment issue away from the police conduct, and towards the character and predisposition of the particular defendant on trial.

The Fourth Appellate District, Division Three, in its published opinion, declined petitioner's invitation to follow *Martinez*. Instead, the Court of Appeal in petitioner's case aligned itself with the opposing cases of *People v. Arthurlee* (1985) 168 Cal.App.3d 246 and *People v. Kelley* (1984) 158 Cal. App.3d 1085 (Pages 8-9 of Exhibit A). Both *Arthurlee and Kelley* considered and rejected attacks upon the challenged instructions.

Petitioner submits that *Martinez* is correctly reasoned and decided. Its holding should, therefore, be endorsed by this Court for two reasons (1) to ensure that defendants situated as petitioner was, received a fair trial and an accurate recitation of the law at close of trial; and (2) to resolve what is presently an interdistrict and intradistrict conflict in the law.

A review of the instructions shows that they do indeed focus the jury's attention upon the individual conduct of the accused, rather than upon the conduct of the police agency involved. This effect runs directly contrary to the *Barraza* holding that the focus is to be exclusively on the conduct of the police (*Id.*, at p. 688-689). The lengthy and well-reasoned opinion in *Martinez* supports the ultimate conclusion that: "'A closer analysis of the *Barraza* opinion shows, however, that it was evidently not the Court's

intention, nor its holding, that the objective test and concomitant focus on police conduct should be compromised by concentration upon the character of the defendant." (*People v. Martinez, surpa,* at p. 666).

The California Supreme Court having denied review, the published opinion in petitioner's case now perpetuates the confusion surrounding the law of entrapment in California. The decision below states that the terms "subjective test" and "objective test" of entrapment were of limited utility in deciding the instructional issue (Pages 10-11 of Exhibit A). Yet these terms came straight from the *Barraza* opinion (*People v. Barraza, supra,* at p. 689; dis.opn. at 694 (Clark, J.)).

The decision below also apparently validates a "hybrid" test of entrapment in California, in that it partakes of both subjective and objective elements (Page 10 of Exhibit A). It was this "hybrid" form of entrapment which was explicitly rejected in the *Barraza* opinion: "Our more limited focus on the character and intent of the accused is still misplaced and impairs our courts in their task of assuring the lawfulness of law enforcement activity" (*Id.,* at p. 689).

The Court of Appeal in petitioner's case has therefore rejected the very terms of art ("objective test" vs. "subjective test") used by the California Supreme Court to describe the issue. The decision below further attempts to resurrect a "hybrid" theory of entrapment which the decision in *Barraza* was intended to lay to rest. These developments are symptomatic of the confusion surrounding the entrapment issue in the intermediate courts in California. Petitioner and other defendants are at least entitled to a consistent definition of entrapment throughout the state.

While it may be true that California is entitled to adopt whatever definition of entrapment it finds desirable, within Constitutional limits, "on the other hand, due process places some limits on its exercise." (*Lambert v. California*, 355 U.S. 225, 228, —S.Ct.—, —L.Ed.— (1957)).

In determining the effect of an erroneous instruction upon a conviction, a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge (*Donnelly v. DeChristoforo, supra*, at p. 645). This does not mean, however, that a single instruction may not be so prejudicial so as to call for reversal (*Id.*, at p. 645). In petitioner's case there were an entire series of erroneous instructions read to the jury, and the erroneous instructions went to the heart of petitioner's defense. The prejudice was such that petitioner was denied his right to a fair trial.

3. Petitioner was deprived of his right to a fair trial by prosecutorial misconduct in misstating the standard by which entrapment is to be measured in the state of California.

A prosecutor is subject to due process limitations against prejudicial remarks and argument (*Donnelly v. DeChristoforo, supra*). A constitutional violation will be found if the improper remarks infected the entire trial with unfairness, as judged in relation to cautionary instructions by the trial court, the general tenor of the trial, and the remainder of the prosecutor's comments (*Id.*).

Petitioner has previously contended that the instructions given at his trials did not accurately embody the law of entrapment. The effect of the erroneous instructions was compounded by misstatement by the prosecutor of the

applicable law contained in the instructions. If the instructions were to be argued at petitioner's trials, petitioner had a right to have them argued correctly.

The misstatement of law occurred when the prosecutor argued the entrapment instructions to the jury and consistently invited the jury to substitute a purely subjective standard in place of the "normally law-abiding person" standard which appears in the instructions.

The misstatement involved is best illustrated by brief citation to the record. In closing and rebuttal arguments, the prosecutor stated:

* * *

"What's a normally law-abiding person? A L.A.O.? I would submit to you that you are a normally law-abiding person." (RT V 157)

* * *

"Do you think you might be able to come up with a better instruction for him to keep yourself out of selling cocaine?" (RT V, 168)

* * *

"Would you, say, for $400.00 commit a felony?" (RT V, 168)

* * *

"If it would be likely to induce a person like you to commit the crime is what the instruction says." (RT V, 168)

* * *

"You would have to say that not just you, but you in the situation where you, like the defendant claims didn't deal dope yourself, you're not a dope dealer." (RT V, 191)

* * *

These citations are merely illustrative and not exhaustive. Petitioner contended on appeal that these repeated invitations constituted misconduct because they invited each juror to substitute his or her own subjective standard for the objective standard mandated by *Barraza*. The prosecutor's argument invited the jurors to measure petitioner's entrapment claim by their own various predispositions to commit the offense; that is, by twelve differing standards of entrapment. The correct test should have been not whether "you, the particular venirperson" would have been entrapped, but rather whether a "normally law-abiding person" would have been entrapped. The difficulty in convincing each particular juror that he personally would have befallen petitioner's difficulties is apparent. It will be recalled that at least one California court has analogized the entrapped person standard to the reasonable man hypothetical in negligence cases (*People v. Grant, supra*). The prosecutor's argument here allowed each juror to personalize the standard of entrapment, in direct contravention of the law stated in *Barraza*.

The Court of Appeal agreed in essence with petitioner's contention, holding that "the prosecutor should not have advanced this argument" (Page 11 of Exhibit A). While virtually conceding error, the Court of Appeal further held that it would not view such error as prejudicial. Petitioner respectfully disagrees; the effect of the misstatement of law was simply devastating. It did away entirely with an objective standard of entrapment. The exclusive focus on police conduct mandated by Barraza was superseded entirely by an appeal on each juror's instincts and personal feelings regarding how he would have reacted in a similar

situation. Petitioner's entrapment claim was thus subject to and judged by twleve differing standards.

Viewed within the context of the entire case, the misstatement of the law was prejudicial. It went directly to the heart of petitioner's case. It occurred at the end of the trial; the repeated misstatements of the prosecutor were thus the last thing the jurors took with them into the jury room. The misstatements bore directly upon the single issue raised by petitioner. The fact that this single issue was a potent one is indicated by the fact that petitioner obtained a hung jury and mistrial at his first trial. Petitioner's version of events was a credible one, as evidenced by the result of the first trial, while the state relied primarily upon the testimony of an admitted informer/drug addict who had pretended to be a "friend in need" of petitioner's.

The issue under discussion has larger repercussions for the criminal justice system in California. It presents the opportunity for this Court to determine the extent to which a prosecutor may implicate the subjective opinions of the jurors, while arguing a case which involves the objective standard of entrapment.

In the present case, petitioner contends, the prosecutor went too far. His repeated misstatement of the law cost petitioner his right to a fair trial and due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

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CERTIFIED FOR PARTIAL PUBLICATION[1]

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintff and Respondent,

v.

JAMES ROBERT SLATTON,

Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of Orange County, James O. Perez and Kenneth E. Lae, Judges. Affirmed.

Bruce M. Margolin and Joseph P. Farnan for Defendant and Appellant.

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[1] Pursuant to California Rules of Court, rule 976, subdivision b, parts I, III and IV are not published, as they do not meet the standards for publication.

John K. Van de Kamp, Attorney General, Steve White, Cheif Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Jay M. Bloom and Keith I. Motley, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Robert Slatton was convicted of two counts of sale of cocaine (Health & Saf. Code, § 11352) in separate jury trials. He raised three issues: (1) prosecutorial suppression of material evidence; (2) prosecutorial misconduct and instructional error concerning his defense of entrapment and; (3) sentencing error, particularly in the denial of probation. We affirm.

In February 1981, informant Jeff Lourien contacted sheriff's deputy Robert Russell and implicated Slatton in cocaine trafficking. One February 19, Russell, Lourien and Slatton met at a restaurant and discussed the price for a quantity of cocaine, but no sale was consummated.

On March 9, the three met again at the restaurent and Slatton sold Russell a one-eighth ounce sample of cocaine for $300.00. At a meeting the next day, Slatton agreed to sell Russell a pound of cocaine at a certain motel that evening. Russell rented a room there, but the sale did not occur. After another aborted attempt on March 11, Slatton and Russell arranged to meet at the motel on March 17. Slatton and a confederate arrived with a brown bag containing two plastic baggies of white powder. After Russell tested the powder and determined it was cocaine, Slatton was placed under arrest.

Slatton and Russell had talked on the telephone several times to arrange the sale. During argument in Slatton's first trial the prosecution discovered these conversations had been recorded. A prosecution motion to reopen and introduce the tapes was denied.

The jury returned a verdict of guilty on Count I, concerning the one-eighth ounce sample Slatton sold on March 9.[2] It was unable to reach a verdict on the March 17 half-pound sale and a mistrial was declared on that count.

At the retrial on Count II, the prosecution was permitted to introduce the tape recordings into evidence. Slatton's defense ws entrapment. The jury found him guilty.

I

Slatton contends the prosecution's belated disclosure of the tapes denied his due process of law, violated a discovery order, and mandates reversal. We disagree.

Slatton relies primarily on the line of cases highlighted by *Brady v. Maryland* (1963) 373 U.S. 83 and *People v. Ruthford* (1975) 14 Cal.3d 399 to argue the prosecution had a duty to disclose the tapes. With that we have no quarrel; they should have been unearthed and disclosed earlier.

But Slatton "concedes that the failure to disclose material evidence, at least where not wilful, should not be punished by suppression of evidence but, by giving the offended party time to meet the new evidence . . ." The concession embodies the law on the issue. (See *People v. McRae* (1967) 256 Cal.App.2d 95, 104.) Slatton does not argue there was inadequate time between trials to prepare to meet this evidence. The trial court found there was no prejudice and took the additional precaution of permitting the prosecution

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[2] For the first time at oral argument, Slatton mounts a vague attack on the conviction for this count. In essence, he incorporates the arguments he has consistently made concerning Count II. In light of our disposition of these issues, we need not further address the propriety of this belated challenge to Count I.

upon retrial to use *either* the tapes *or* Slatton's testimony from the first trial, but not both. This eliminated any problem of impeachment tainted by belated disclosure.

Recognizing these obstacles, Slatton contends he was denied due process because nondisclosure of the tapes was *intentional* and called for sanctions. (Cf. *People vs. McGowan* (1980) 105 Cal.App.3d 997, 1001.) The argument has fatal flaws. First and foremost, Slatton did not present the contention to the trial court. (Cf. *People v. Mayorga* (1985) 171 Cal.App.3d 929.) Slatton's concern at the retrial was use of *both* his testimony from the first trial *and* the tapes to impeach him. The court fashioned a remedy to prevent this and Slatton's counsel expressed satisfaction with it. There was no objection to the use of the tapes as a result of their belated disclosure or because he was denied due process. No sanctions were requested. Slatton may not present these arguments for the first time on appeal. (*People v. Epps* (1981) 122 Cal.App.3d 691, 704; see also *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Nevertheless, Slatton now attempts to present a circumstantial case of intentional suppression. The point should have been raised with the trial court. And even though it was not, the trial court essentially rejected the contention when it found there was no improper action by the police or presection.

Even if we reach the merits of Slatton's attempt to show intentional suppression, it is wholly unconvincing. The tapes contained absolutely no exculpatory material.[3] It was

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[3] To the extent Slatton now attempts to argue nondisclosure prejudiced him on Count I, this fact thoroughly undermines the contention.

Slatton, not the prosecution, who was interested in keeping their content from thejury.

He has demonstrated no prejudice from the use of the tapes or their belated disclosure.[4] Consequently, there was no error.

II

Slatton argues the instructions on entrapment were erroneous. Again, we disagree.

CALJIC instructions, Numbers 4.60, 4.61 and 4.61.5, were given.[5] They were created after the Supreme Court's

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[4] For the first time at oral argument, Slatton suggests earlier disclosure of the tapes might have affected plea negotiations. This contention is wholly speculative; we deline to address it further.

[5] CALJIC 4.60 states: "It is a defense to the commission of an act, otherwise criminal, that such act was induced by the conduct of law enforcement agents or officers [or persons acting under their direction, suggestion or control] when the conduct was such as would likely induce a normally law-abiding person to commit the crime. [¶] To establish this defense the defendant has the burden on proving by a preponderance of the evidence that the conduct of the law enforcement agents or officers [or persons acting under their direction, suggestion or control] was such as would likely induce a normally law-abiding person to commit a crime. [¶] Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. [¶] If you find by a preponderance of the evidence that this defense has been established, the defendant is entitled to a verdict of acquittal."

CALJIC 4.61 states: "In determining whether this defense has been established, guidence will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of such conduct would be an appeal by the police that would

landmark case on entrapment, *People v. Barraza* (1979) 23 Cal.3d 675. Nevertheless, Slatton contends these instructions are contrary to *Barraza* because they instruct the jury to use a *subjective* rather than *objective* standard in evaluating the police conduct vis-a-vis the defendant.

People v. Barraza, supra, 23 Cal.3d 675 establishes the following standard for evaluating the defense of entrapment: "[W]as the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? (*Id.*, at pp. 689-690.) This is followed by an explanation of the operative principles the *Barraza*

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induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. [¶] Finally, while the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this purpose, for example, are the transactions preceding the offense, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission. [¶] [Such matters as the character of the defendant, his predisposition to commit the offense, and his subjective intent are not relevant to the determinattion of the question of whether entrapment occurred.]"

CALJIC NO. 4.61.5 states: "It is permissible for law enforcement agents or officers [or persons acting under their direction, suggestion or control] to provide opportunity for the commission of a crime indulging reasonable, through restrained, steps to gain the confidence of suspects but it is not permissible for law enforcement agents or officers [or persons acting under their direction, suggestion or control] to induce the commission of a crime by overbearing conduct such as badgering, coaxing or cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

court found most important in answering this question. (*Id.*, at pp. 590-691.) This discussion culminates with the point the factual context of the offense should be considered in determining entrapment. (*Ibid.*) Labelling this an "objective" standard can be deceptive; our Supreme Court took great pains to thoroughly examine this defense. Beyond saying the defense of entrapment after *Barraza* focuses on the police conduct rather than the defendant's character, generalities can be misleading. The CALJIC instructions adopt the Supreme Court's language.

Nevertheless, whether the instructions are true to the principles of *Barraza* is the subject of conflicting court of appeal opinions. *People v. Arthurlee* (1985) 168 Cal.App.3d 246 and *People v. Kelley* (1984) 158 Cal.App.3d 1085 endorse the CALJIC instructions while in *People v. Martinez* (1984) 157 Cal.App.3d 660, the court held the instructions erroneously focus on the nature of the defendant rather than the nature of the police activity. Slatton relies on *Martinez*, but we agree with *Arthurlee* and *Kelley* — the CALJIC instructions on entrapment do not distort the applicable principles enunciated in *Barraza*.

The following passage from *Arthurlee* encapsules our view as well: "The *Barraza* principles are incorporated in the standard jury instructions on entrapment, which the trial court gave in this case. [Citation.] Appellant argues on appeal, however, that under the authority and reasoning of *People v. Martinez* (1984) 157 Cal.App.3d 660, the CALJIC instructions given to the jury in the instant case were erroneous. [¶] In *Martinez*, the court found that these same CALJIC instructions on entrapment did not accurately reflect the *Barraza* holding upon which they are based. [Citation.] The court reasoned that the normally law-abiding person' entrapment standard, as set out in the

CALJIC instructions, unfairly focuses the jurors' attention on the subjective character, predisposition and intent of the actor (defendant) and away from the objective nature and extent of the police conduct in issue. Thus, the goal of *Barraza*, to use an 'objective' standard in determining whether entrapment occurred, would be better effectuated by jury instructions that do not use the phrase 'normally law-abiding person' for the standard. [Citation.] Therefore, the court held in *Martinez* that because the court used CALJIC Nos. 4.60, 4.6l and 4.61.5, the jury was not fairly instructed on the defense of entrapment. [Citation.] [¶] We do not follow the *Martinez* rationale and holding in the instant case. We find that the use of the phrase 'normally law-abiding person' in the CALJIC instructions given to the jury was correct under *Barraza*. 'The instruction[s] [make] clear that the test of entrapment is an objective not subjective one . . .' [Citation.] [¶] We follow the cases subsequent to *Barraza* which have also adhered to the 'normally law-abiding' language of the decision. (*Kelley, supra*, at p. 1096; see *People v. McIntire* (1983) 141 Cal.App.3d 645, 655; *People v. Allison* (1981) 120 Cal.App.3d 264, 272.) [¶] We therefore find that the jury instructions were not erroneous and that the jury was fairly instructed under *Barraza*. Thus, no reversible error occured in this case." (*People v. Arthurlee, supra*, 168 Cal.App.3d 246, 251-252.)

We perceive an additional difficulty with the *Martinez*, opinion and echo our earlier observations about the *Barraza* standard. The *Martinez* majority seemed perplexed because the Supreme Court adopted an "objective" standard which nonetheless encompasses "subjective" considerations. (*People v. Martinez, supra*, 157 Cal.App.3d 660, 666.) In our view, the Supreme Court adopted a new standard, which it explained at length. Attempting a shorthand

description of the standard ("objective" test) may be useful to commentators, but is a very limited utility in passing on the adequacy of instructions purporting to embody it. The CALJIC instructions, by using *Barraza's* language, appropriately include the standard's complexity. We cannot fault these instructions for loyally imparting the complexities of the current entrapment standard to the jury.

III

Slatton also argues prosecutorial misconduct during argument on the issue of entrapment requires reversal. Discussing the instructions on entrapment, which had not been read to the jury, the prosecutor analogized the "normally law-abiding person" to the jurors themselves. According to Slatton, this diverted the jury's focus from the objective standard of *Barraza.*

The prosecutor should not have advanced this argument — it is a variation of the "Golden Rule" argument, forbidden in civil cases, inviting jurors to place themselves or a loved one in the position of an injured plaintiff for puposes of damages. (See e.g. *Horn v. Archison, T & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 609.) But there was no *objection* or request for admonition. When prosecutorial misconduct is complained of for the first time on appeal, the question to be decided is whether a timely objection and admonition would have cured the harm. If it would, the complaint must be rejected. (*People v. Green* (1980) 27 Cal.3d 1, 34; *People v. Fondron* (1984) 157 Cal.App.3d 390, 395.) Any harm would have been cured by an admonition or reading of the relevant instructions. And an admonition to disreqard the remark would have eliminated any prejudice. We presume a jury is capable of heeding such admonitions. (*People v.*

Allen (1961) 189 Cal.App.2d 706, 710.) Consequently, Slatton's claim must be rejected.

And even if we did not consider the issue waived, Slatton would not prevail. He correctly contends that misconduct need not be intentional to be harmful. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-214.) "The general rule is that the misconduct is harmful when it is reasonably probable that a more favorable result to the defendant would have occurred had the prosecutor not committed the misconduct." (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171.)

Argument was followed by correct instructions on entrapment. We also presume the jurors followed the instructions given. (*People v. Ricketts* (1970) 7 Cal.App.3d 441, 446.) The correct instructions cured any possible harm. In addition, the defense of entrapment did not present a close case. For this reason as well, any perceived misconduct does no call for reversal. (See *People v. Parsons, supra*, 156 Cal.App.3d 1165, 1171-1172.) Thus, even if we assume there was misconduct, a result more favorable to Slatton is not reasonably probable.[6]

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[6] Slatton belatedly attemps to expand this argument by contending CALJIC 2.51, declaring evidence of motive relevant but not required, also undercut his entrapment defense. The record reveals Slatton requested this instruction and thus connot now complain. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 330; see also *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 567.) Moreover, the entrapment defense was based in part on the relatively paltry sum of money involved, suggesting Slatton would not have taken the risk but for the fact he was helping a friend. Motive was at issue; the jury was properly instructed.

IV

Finally, Slatton urges there were several sentencing errors. Probation was denied on Count II, and he was sentenced to the lower term in state prison.[7]

First, Slatton contends probation should not have been denied because the factors in favor of granting probation outweighed those against. "The trial court has broad discretion to grant or deny probation . . . and a decision denying probation will be reversed only upon a clear showing of abuse and that the court acted in a capricious or arbitrary manner. [Citations.]" (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803; *People v. Hernandez* (1980) 111 Cal.App.3d 888, 898.) A heavy burden is placed on a defendant in attempting to show an abuse of discretion in denying a request for probation. (*People v. Goodson* (1978) 80 Cal.App.3d 290, 295.) Slatton has failed.

The trial court read and considered all the material presented, including the probation reports and Slatton's character references. The court specifically commented on the facts militating for and against probation. In denying probation, the trial court relied primarily on the quantity of cocaine involved (one-half pound of 90% pure cocaine), and the sophistication of the sale.

Slatton argues the trial court's determination fails to satisfy the criteria set forth in *People v. Axtell* (1981) 118 Cal.App.3d 246: "[T]he decision to grant or deny probation must be based on three factors: 1) whether confinement is necessary to protect the public from the defendant; 2) whether the defendant can best be rehabilitated through

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[7] After the first trial, probation was granted on Count I, and a nine-mounth jail sentence imposed.

imprisonment or normal community contact; and 3) whether probation would unduly depreciate the seriouness of the crime." (*Id.*, at p. 255; see also *People v. Bolton, supra*, 23 Cal.3d 208, 217.) We reject this contention; there is no indication the trial court failed to consider these factors and we are not aware of any reqirement the court must specifically mention these factors *on the record*, as Slatton suggests. We also reject this contention the size of the sale cannot justify denial of probation.

Second, Slatton contends the trial court relied on improper entries in one probation report. The report mentions later arrests of others made as a result of Slatton's sale of the half- pound of cocaine. The following facts were contained in this pre-plea report prepared by the probation officer: Slatton's source, John Phillips,[8] was followed to the residence of a Ronald Chavez where a major narcotics dealer, James Crittendon, was arrested for possession of several controlled substances.

The trial court set forth in detail the factors it was weighing in considering the application for probation — these facts are not among them. "'[T]he primary function served by the probation report . . . *is to assist the court* in determining an appropriate disposition after conviction.'" (*People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Edwards* (1976) 18 Cal.3d 796, 801.) Having considered the report, the court may reject the report and recommendation of the officer; the final determination lies within the sound discretion of the judge, not the probation officer. (See *People v. Warner, supra*, at p. 683.) Slatton has not even demonstrated the probation officer used this information to

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[8] Phillips was charged with Slatton in the present case. After posting bail, he disappeared and was not tried with Slatton.

recommend denial of probation. He certianly has not shown the trial court used it. The mere presence of this material in the pre-plea report does not require resentencing.

Third, Slatton complains the preparation of the second report denied him due process of law.[9] He notes the similarity of the two reports. This is not surprising, because they were prepared within approximately two months of one another. He also complains he was not interviewed before the preparation of the supplemental report. The report suggests otherwise, since Slatton comments on his first trial in it. In any event, he fails to explain what prejudice resulted, even if true.

Slatton further contends that supplemental report fails to reflect two changed circumstances: his then recent marriage and a heart condition. In fact, his marriage is mentioned in the supplemental report. Slatton's attorney mentioned the heart condition at a date set for sentencing after the second trial and obtained a three week continuance to present a doctor's report. The condition was never mentioned at sentencing; either it was nonexistent or Slatton's attorney, *not* the probation officer, failed to pursue the issue. In either event, there was no impropriety.

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[9] A pre-plea probation report was prepared prior to Slatton's trial, and a supplemental report prepared prior to the retrial on Count II.

In short, we fail to see how the preparation of the supplemental report denied Slatton due process. The perceived deficiencies are either nonexistent, or matters Slatton could easily have raised at sentencing had he so desired. Clearly, his claims do not entitle him to resentencing; probation was properly denied.

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

s/SONENSHINE

WE CONCUR:

s/CROSBY

s/WALLIN

APPENDIX B

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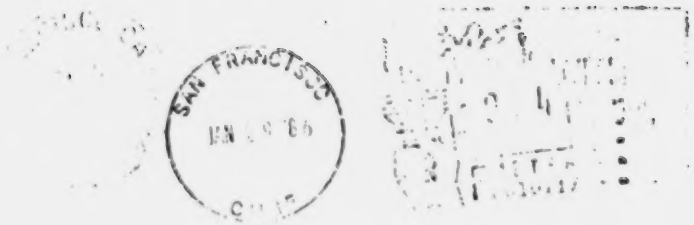

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JAN 2 9 1986

I have this day filed Order

REVIEW DENIED

In re 4 Crim. *No.* G000659

People

vs.

James Robert Slatton

Respectfully,

Clerk

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